Supreme Court, U.S.
FILED

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No.

In The
Supreme Court of the United States
October Term, 1997

HORACE LOCKHART,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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25 pp

QUESTION PRESENTED FOR REVIEW

WHETHER THIS COURT'S DECISION IN *ALVAREZ-MACHAIN*, ALLOWING ABDUCTION AS AN ALTERNATIVE TO EXTRADITION, IS APPLICABLE TO COUNTRIES, OTHER THAN MEXICO, REGARDLESS OF THE LANGUAGE OF THEIR EXTRADITION TREATIES?

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), the following is a list of all parties to the proceedings:

Ted E. Bandstra

Linda Collins Hertz

Adalberto Jordan

Horace Lockhart

Lenore C. Nesbitt

Roger Powell

Guy W. Turner

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OPINION BELOW

On February 4, 1997, the United States Court of Appeals for the Eleventh Circuit in *United States of America v. Horace Lockhart*, No. 95-5111 (11th Cir.) (per curiam) affirmed "Lockhart". A copy of *Lockhart* is attached hereto as **APPENDIX A**.

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit in *Lockhart* was filed on February 4, 1997. This petition for a writ of certiorari was filed within 90 days of that date. *See* Supreme Court Rule 13. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND TREATIES INVOLVED

Article VI, Clause 2, of the United States Constitution provides, in pertinent part: "This Constitution,... and all other *Treaties* made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land..." U.S. Const., Article VI, Clause 2. (Emphasis added).

The Extradition Treaty between the *United States and Mexico,* provides in pertinent part:

ARTICLE I
OBLIGATION TO EXTRADITE

1.- The Contracting Parties agree to mutually extradite, subject to the provisions of this Treaty, persons who the competent authorities of the requesting Party have charged with an offense, or are wanted by said authorities to complete a judicially pronounced penalty of depravation of liberty for an offense committed within the territory of the requesting Party.

2.- For an offense committed outside the territory of the requesting Party, the requested Party shall grant extradition if:

(a) its laws would provide for the punishment of such an offense committed in similar circumstances, or

(b) the person sought is a national of the requesting Party, and that Party has jurisdiction under its own laws to try that person.

ARTICLE II
EXTRADITABLE OFFENSES

1.- Extraditions shall take place, subject to this Treaty, for wilful acts which fall within any of the clauses of the Appendix and are punishable in accordance with the laws of both Contracting Parties by deprivation of Liberty, the minimum of which shall not be for less than one year.

2.- If extradition is requested for execution of a sentence, there shall be the additional requirement that the part of the sentence remaining to be served shall not be less than six months.

3.- Extradition shall also be granted for wilful acts which, although not included in the Appendix, are punishable according to the Federal Laws of both Contracting Parties, by deprivation of Liberty, the minimum of which shall not be less than one year.

ARTICLE III
EVIDENCE REQUIRED

Extradition shall be granted only if the evidence be found sufficient, according to the laws of the requested Party, either to justify the committal of trial of the person sought if the offense of which he has been accused had been committed in that place or to prove that he is a person convicted by the courts, of the requesting Party.

ARTICLE IX

1. Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.

2. If extradition is not granted pursuant to paragraph 1 of this Article, the requested Party shall submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense.

United States and Mexico Treaty, 31 U.S.T. 5059; TIAS 9656 (Enforced January 25, 1980).

The Extradition Treaty between the *United States and the Dominican Republic,* provides in pertinent part:

ARTICLE I

It is agreed that the Government of the United States and the Government of the Dominican Republic shall, upon mutual requisition duly made as herein provided, deliver up to justice any person who may be charged with, or may have been convicted of any of the crimes specified in article two of this Convention committed within the jurisdiction of one of the Contracting Parties while said person was actually within such jurisdiction when the crime was committed, and who shall seek an asylum or shall be found within the territories of the other, provided that such surrender shall take

place only upon such evidence of criminality, as according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had been there committed.

ARTICLE IV

No persons shall be tried for any crime or offense other than that for which he was surrendered.

United States and the Dominican Republic Treaty, 36 Stat. 2468 (1909).

The Extradition Treaty between the *United States and Honduras,* provides in pertinent part:

ARTICLE I

It is agreed that the Government of the United States and the Government of Honduras shall, upon mutual requisition duly made as herein provided, deliver up to justice any person who may be charged with, or may have been convicted of any of the crimes specified in article two of this Convention committed within the jurisdiction of one of the Contracting Parties while said person was actually within such jurisdiction when the crime was committed, and who shall seek an asylum or shall be found within the territories of the other, provided that such surrender shall take place only upon such evidence of criminality, as according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and

commitment for trial if the crime or offense had been there committed.

ARTICLE IV

No persons shall be tried for any crime or offense other than that for which he was surrendered.

United States and Honduras Treaty, 37 Stat. 1616 (1909).

STATEMENT OF THE CASE

A. History

On September 16, 1993, the United States Government supplied information to its agents in the Dominican Republic and to Dominican agents assisting them regarding *Horace Lockhart*. (R23-3-64; R10-157). On September 21, these agents traced *Mr. Lockhart* from his hotel in Santo Domingo to the Vessel Sea Search which was anchored in Puerto Plato. (R10-157, R9-24).

On September 22, 1993, U.S. D.E.A. agents, Fidel Sanchez and Kevin O'Brien assisted Dominican agents in the arrest of *Horace Lockhart* and the search of his vessel. (R24-25, 83-84, 125-126; R10-157).

At the request of the D.E.A., *Mr. Lockhart* was held in the Dominican Republic, without a bond and without a hearing. On September 29, 1993, an Indictment was returned in the United States, charging *Mr. Lockhart* and others with a drug conspiracy and drug substantive counts which were alleged to have occurred between June 30, 1992 and October 21, 1992. (R1-78).

After being detained, in deplorable conditions, without charges[1] for 10 days, *Mr. Lockhart* was taken to the airport in

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[1] He was subjected to threats and mental torture, while being denied access to counsel or the opportunity to contact any person on his behalf. This lengthy detention was at the request of the U.S. D.E.A. (R9-32-33, 38, 96).

Santo Domingo, and at the request of the U.S. D.E.A., he was placed on an American Airlines flight bound for Miami. (R9-36-37, 39, 67).

Mr. Lockhart filed a Motion to Dismiss the Indictment on Due Process grounds. (R1-113; R2-163-172). The Government responded to these Motions. (R1-119-120-122-123-140-141-142). The Trial Court denied *Mr. Lockhart's* Motion to Dismiss. (R10-271).

In June of 1994, the Government filed a Superseding Indictment, charging *Mr. Lockhart* with additional offenses and expanding the original conspiracies to cover the period from 1980 to 1993. (R2-193). *Mr. Lockhart* filed a Motion to Dismiss the Superseding Indictment on Due Process grounds as well as on the basis of "doctrine of specialty". (R2-214).

On March 13, 1995, *Mr. Lockhart* was found guilty of two conspiracy counts involving the period from 1980 to 1983 and two attempt to import counts. He was found not guilty of the Continuing Criminal Enterprise count, of attempt to import and of possession with intent to distribute in April of 1993. He was subsequently sentenced to 292 months in prison. (R6-292-293).

B. The Eleventh Circuit Decision

On February 4, 1997, the United States Court of Appeals for the Eleventh Circuit affirmed *Lockhart's* conviction without opinion, **APPENDIX A.**

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THIS PETITION TO RESOLVE THE CONFLICT BETWEEN ITS DECISION IN *ALVAREZ-MACHAIN* AND THE DECISIONS OF LOWER COURTS THAT MISAPPLY IT TO TREATIES WHICH CONTAIN DIFFERENT LANGUAGE THAN THE TREATY BETWEEN THE *UNITED STATES AND MEXICO.*

A. The *Alvarez-Machain's* Decision and the *American-Mexican Treaty.*

This Court, in reaching its decision in *United States v. Alvarez-Machain*, 504 U.S. 655, 112 S.Ct. 2188; 119 L.Ed.2d 441 (1992), analyzed the *Treaty between the United States and Mexico. See American-Mexican Treaty*, TIAS 9656, 31 U.S.T. 5059. Its decision in that case was primarily based upon their interpretation of Article IX of that Treaty which provides:

> 1. Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.
>
> 2. If extradition is not granted pursuant to paragraph 1 of this Article, the requested Party shall submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense. *United States and Mexico Treaty,* 31 U.S.T. 5059, TIAS 9656.

This Court held that "Article 9 does not purport to specify the only way in which one country may gain custody of a national of the other country for prosecution". *Alvarez-Machain*, 504 U.S. at 664.

This decision was based upon the Court's analysis of the specific language of the *Treaty between the United States and Mexico*. Nowhere in this decision does it indicate that it applies universally to all Treaties, or that it authorizes abduction as an alternative to extradition no matter what which country is involved or what language their Treaty contains.

B. Mis-Application of *Alvarez-Machain*

The Ninth Circuit Court of Appeals was asked to consider the Extradition Treaty that existed between the *United States and Honduras*. It held that, "The treaties between the *United States and Honduras* contain preservations of rights similar to those which *Alvarez-Machain* held did not sufficiently specify extradition as the only way in which one country may gain custody of a foreign national for purposes of prosecution. *Compare* 504 U.S. at 665-66, 112 S.Ct. at 2194-95 *with* 1909 Honduras-United States Extradition Treaty (37 Stat. 1616; 45 Stat. 2489)..." *United States v. Matta-Ballesteros*, 71 F.3d 754 (9th Cir. 1995). One need only glance at the *American-Honduran Treaty*, (*See* excerpt on Pages 5-6), to see that the language contained therein is not similar to the *American-Mexican Treaty* and thus the Ninth Circuit application of *Alvarez-Machain* was misplaced.

C. Extradition Treaty Between the *United States and Dominican Republic*

The 1910 *Treaty between the United States and the Dominican Republic,* 36 Stat. 2468, regarding extradition, is almost a mirror image of the *United States-Honduran Treaty.* It is very different from the *American-Mexican Treaty*, 37 Stat. 1610. This Treaty has been enforced by the United States Courts as the Law of the Land. *In the Matter of Extradition of Gonzalez*, 217 F.Supp. 717 (S.D.N.Y. 1963).

Recently, a Federal District Court in Puerto Rico, referred to the *Alvarez-Machain* decision and without specifically construing the language of the *Treaty* between the *United States and the Dominican Republic*, stated, "It is clear that if the plaintiff had chosen to abduct the defendant and forcibly bring her to this jurisdiction, the Government could have prosecuted her." The *United States v. Olga Matos*, 1996 U.S. Dist. Lexis 2692 (Dist. Ct. Puerto Rico, Feb. 1996).

If the Supreme Court's decision in *Alvarez-Machain* holds that no Extradition Treaty excludes abduction, then the lower Courts are correct in not examining the language of the specific Extradition Treaty before ruling. However, this Court's holding in *Alvarez-Machain*, does not seem to go that far. It requires an examination of the language of the Treaty in effect in each case. This is not being done.

D. *Lockhart*

In the case of *Lockhart*, the American Agents convinced their partners in the Drug Enforcement agency of the Dominican Republic to skirt Dominican law and to create a condition where they could abduct *Mr. Lockhart* from the Dominican Republic. In order to do this, at the request of the D.E.A., *Mr. Lockhart* was arrested and held without access to counsel, or the courts for ten days. At the specific request of the United States, he was then forcibly placed on a plane bound for the United States. At this point, American agents substituted their handcuffs for those of their Dominican friends and thus completed his abduction. By so doing, the D.E.A. was able to ignore the "Supreme Law of the Land", in this case a Treaty between the *United States and the Dominican Republic*. *See* Article VI, Clause 2, of the *Constitution of the United States*. These actions were taken in reliance of this Court's decision of *Alvarez-Machain*, which they misinterpreted as a green light to abductions anywhere in the world, no matter what the language in the Treaty.

Lower Courts have *not analyzed* the language of the Dominican Treaty to see if it is the same as that of the *American-Mexican Treaty*. Not all these Extradition Treaties are alike. The Treaty between the *United States and the Dominican Republic*, is significantly different from the Treaty between the *United States and Mexico*. It is far more explicit. For example, Article I of the *Dominican Treaty* is unique. It expressly *limits* the circumstances under which either party may *surrender* individuals charged with crimes by the other party to the Extradition Treaty. It provides that

"... such surrender shall take place *only* upon such evidence of criminality, as according to the laws of the place where the fugitive or person so charged *shall be found*, would justify his apprehension and commitment for trial if the crime or offense had been there committed." (Emphasis added). In contrast, the Supreme Court in *Alvarez-Machain* noted that the Extradition Treaty between *Mexico and the United States* "does not purport to specify the *only* way which one country may gain custody on a person of the other country for prosecution." *Alvarez-Machain*, 112 S. Ct. at 2194 (Emphasis added).

In the case of *Lockhart*, the language of the Treaty is ignored when a trick is concocted by the American Government to skirt the Treaty. It was again ignored when the Government filed a Superseding Indictment which expanded both the size and scope of the conspiracy, and added new counts, thus skirting the "Doctrine of Speciality" and Article IV of the *Treaty between the United States and the Dominican Republic*.

Lockhart is one example, of cases that have occurred and other cases to come, in which the misinterpretation of *Alvarez-Machain* provided a green light to lower Courts and U.S. agents to ignore Treaties between the United States and Foreign Countries in seizing individuals, regardless of the language of the Treaties in question. This is to effectively eliminate Article VI, Clause 2, of the *United States Constitution* which says in part, "all other Treaties made...under the authority of the United States, shall be the Supreme Law of the Land...".

If the Government of the United States wishes to no longer be bound by this Treaty, Article XIV of the Treaty provides the mechanism for its termination. Either country may, "at any time terminate" the Treaty provided it gives the other Contracting Party six months notice of its intention to do so. See *United States and the Dominican Republic Treaty,* Article XIV, 36 Stat. at 2476.

The Court should see this case as an opportunity to clarify its ruling in *Alvarez-Machain*, so the lower Courts will maintain their obligation under the Article VI of the Constitution of the United States, to uphold the Treaties between the *United States and other nations* as the "Supreme Law of the Land".

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that his Petition For a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was mailed this 2nd day of May 1997 to: The Solicitor General, United States Department of Justice, 10th & Constitution Avenues, N.W., Washington, D.C. 20530; United States Department of Justice, Criminal Division, Appellate Section, P.O. Box 899, Ben Franklin Station, Washington, D.C. 20044-0899; and Adalberto Jordan, Assistant United States Attorney, United States Attorney's Office, 99 N.E. 4th Street, Miami, Florida 33132-2111.

By: _____
GUY W. TURNER

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 95-5111

D. C. Docket No. 92-679-CR-NESBITT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HORACE EDWARD LOCKHART, a.k.a. Clint,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(February 4, 1997)

Before TJOFLAT and BARKETT, Circuit Judges, and GODBOLD, Senior Circuit Judge.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.[1]

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[1] 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of facts that are not clearly erroneous;
(b) the evidence in support of a jury verdict is sufficient;
(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
(e) judgment has been entered without a reversible error of law;

and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.